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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

CORRESPONDENCE FILE

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| In re Applications of | ) | MM Docket No. 99-153 |
| READING BROADCASTING, INC. | ) | File No. BRCT-940407KF |
| For Renewal of License of Station WTVE(TV), Channel 51, Reading, Pennsylvania | ) | |
| and | ) | |
| ADAMS COMMUNICATIONS CORPORATION | ) | File No. BPCT-940630KG |
| For Construction Permit for a New Television Station On Channel 51, Reading, Pennsylvania | ) | |

RECEIVED

JUL 13 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: Administrative Law Judge Richard L. Sippel

**READING BROADCASTING INC.'S MEMORANDUM OF POINTS AND AUTHORITIES ON THE ISSUE OF PRIVILEGE AND OPPOSITION TO ADAMS' MOTION TO COMPEL**

In accordance with Order FCC 00M-47 (released July 12, 2000), Reading Broadcasting, Inc. ("Reading"), by its undersigned counsel, submits this Memorandum of Points and Authorities on the Issue of Privilege. Although not required at this time, Reading also hereby submits its Opposition to Adams' Motion to Compel.

## I. LEGAL STANDARDS

### A. Attorney-Client Privilege

"The purpose of the attorney-client privilege is to protect confidential communications by a client to his or her lawyer for the purposes of obtaining legal advise." E.g., In re WWOR-TV, Inc., 5 F.C.C. Rcd. 6261, ¶ 11 (1990). The key elements of the privilege are: the existence of an attorney-client relationship; a communication from the client to his or her attorney; the communication is legally related; there is an expectation of confidentiality. Id.

### B. Work Product Doctrine

The work product doctrine protects from discovery by one party documents "prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent)." Fed. R. Civ. P. 26(b)(3); see also WWOR-TV, Inc., 5 F.C.C. Rcd. 6261, ¶ 12. Whether a document was "prepared in anticipation of litigation" depends on "'whether, in light of the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.'" In re Sealed Case, 146 F.2d, 881, 884 (quoting Senate of Puerto Rico v. U.S. Dept. of Justice, 823 F.2d 574, 586 n. 42 (D.C. Cir. 1987) (quoting C. Wright, A. Miller, 8 Federal Practice and Procedure, § 2024 at 198 (1970)). In that regard, the lawyer must have had a subjective belief that litigation was real possibility and that belief must have been objectively reasonable. Id.

A party seeking production of documents falling within the scope of the work product doctrine may obtain the requested documents only upon a showing of relevance and that it has a substantial need for the documents which it cannot, without undue hardship, satisfy by other means. See WWOR-TV, 5 F.C.C. Rcd. 6261, ¶ 12; Fed. R. Civ. P. 26(b)(3).

## II. ARGUMENT

### A. The Legal Memorandum In Issue

The legal memorandum in issue (the "Memorandum") was prepared by Joshua W. Resnik, a legal assistant with the law firm of Fleischman & Walsh, L.L.P. ("F&W"), at the specific request of Howard A. Topel, Esq., an attorney with that law firm, and bears an October 12, 1998 date. The Memorandum sets forth Mr. Resnik's interpretations of certain FCC rulings and his summary of allegations relating to Micheal Parker's character made by Shurberg Broadcasting of Hartford ("Shurberg") with respect to the assignment application of Two-If-By-Sea Broadcasting Corporation ("TIBS") for Station WHCT-TV, Hartford, Connecticut, and by Shurberg and Adams Communications Corporation ("Adams") with respect to TIBS's assignment application for Station KAIJ, Dallas, Texas.[1]

In addition to Mr. Resnik's textual interpretations and summaries, the Memorandum bears the handwritten margin notes of attorney Topel. A number of these notes clearly reflect information received from Micheal Parker.

[1] Shurberg and Adams were, at all relevant times, represented by Bechtel & Cole.

## B. The Work Product Doctrine

### 1. The Memorandum and Attorney Topel's Margin Notes Are Protected Work Product.

The Memorandum is a classic example of attorney work product – it was prepared for Reading's attorney[2], not only in the reasonable anticipation of litigation, but in the actual course of litigation. In particular, at the time, F&W was communications counsel for Reading. Given that: (1) Adams and Shurberg had previously filed Petitions to Deny or Dismiss TIBS's Dallas Application based on the Parker character issues; (2) Shurberg had previously raised such issues in the Hartford case; and (3) Bechtel & Cole represented both Shurberg and Adams, the idea that Adams would, once again, raise those same character issues in this case was more than a "real possibility," it was a virtual certainty.[3] In addition, F&W was also communications counsel for TIBS with respect to the Hartford and Dallas assignment applications in which the Parker character allegations were in issue.

Like the text of the Memorandum, attorney Topel's handwritten margin notes are similarly protected work product (i.e., prepared by Reading's counsel in anticipation of litigating those character issues).

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[2] The fact that the Memorandum was prepared for and not by attorney Topel is immaterial. See, e.g., United States v. Nobles, 422 U.S. 225, 238-239 (1975) ("the doctrine protect[s] material prepared by agents for the attorney as well as those prepared by the attorney himself.")

[3] And, of course, shortly thereafter Adams did just that – and now seeks to compel F&W's work product addressing the character issues in order to use that work product against Reading with respect to those very same issues!

### 2. Adams Has Not and Cannot Demonstrate that the Memorandum is Relevant.

In its Motion to Compel, Adams asserts that:

> the Resnik Memorandum is "likely to be relevant . . . as it may confirm or contradict the nature and extent of Mr. Parker's involvement in the preparation of the Parker-Gaulke Letter and/or his familiarity with the assertions made in the Parker-Gaulke Letter and the bases for those assertions.

(Adams Motion, ¶ 5.) Adams alternatively argues that "the contemporaneous Reznik (sic) Memorandum may provide information concerning Mr. Parker's own understanding of the subject matter of the Parker-Gaulke Letter at the time that that letter was written. . . ." (Id.)

Adams' relevance claim is specious. The Parker-Gaulke Letter, which is the sole subject of the further testimony, was written before the Memorandum (which Adams knew when it moved to compel production), therefore, facially, it has no relevance to "the nature and extent of Mr. Parker's involvement in the preparation of the Parker-Gaulke Letter," "[Mr. Parker's] familiarity with the assertions made in the Parker-Gaulke Letter [or] the bases for those assertions," nor can it "provide information concerning Mr. Parker's own understanding of the subject matter of the Parker-Gaulke Letter at the time that that letter was written."[4]

[4] Of course this all begs the larger question, what is the relevance of the October 8, 1998, Parker-Gaulke Letter to the principal issue at hand – Parker's intent, in 1991-92, when he made the statements at issue?

### 3. Adams Has Not and Cannot Demonstrate a Substantial Need for the Memorandum Which It Cannot, Without Undue Hardship, Satisfy by Other Means.

Even if the Memorandum were, in some way, relevant, which it is not, Adams has not and cannot demonstrate a substantial need for it that cannot, without undue hardship, be satisfied by other means. In particular, Adams has indicated that it needs the Memorandum to show "the nature and extent of Mr. Parker's involvement in the preparation of the Parker-Gaulke Letter," "[Mr. Parker's] familiarity with the assertions made in the Parker-Gaulke Letter and the bases for those assertions," or, alternatively, "to provide information concerning Mr. Parker's own understanding of the subject matter of the Parker-Gaulke Letter at the time that that letter was written." All of that information, however, can be obtained from Mr. Parker without having to invade the work product privilege. Thus, Adams has only to ask Mr. Parker: "What was the extent of your involvement in the preparation of the Parker-Gaulke Letter?" "What was your familiarity with the assertions made in the Parker-Gaulke Letter and the bases for those assertions?" "What was your understanding of the subject matter of the Parker-Gaulke Letter at the time that that letter was written?"

Adams' vague and very questionable need for the Memorandum does not justify setting aside the protections of the work product doctrine. See Hickman v. Taylor, 329 U.S. 495, 512 (1947) ("[T]he general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to an orderly working of our system of legal procedure that a burden rests on the one who

would invade that privacy to establish adequate reasons to justify production through a subpoena or court order."); Sealed Case, 146 F.3d 881, 884 ("Without a strong work-product privilege, lawyers would keep their thoughts to themselves, avoid communicating with other lawyers, and hesitate to take notes.")

### C. Attorney-Client Privilege

In addition to being attorney work product, attorney Topel's margin notes also contain attorney-client privileged communications. Thus: the notes reflect information gleaned from Mr. Parker; F&W was, at the time, representing both Reading and TIBS, Mr. Parker being an officer of both companies; the communication relates to the character issues which are the subject of the Memorandum, as well as the subject of actual and anticipated litigation; and given the hotly disputed nature of these issues, there was most certainly an expectation of confidentiality.

## III. CONCLUSION

As demonstrated above, the Memorandum and the accompanying margin notes are protected attorney work product. Since Adams has not and cannot demonstrate that this material is relevant and that it has a substantial need for the Memorandum which it cannot, without undue hardship, satisfy through some other means, Adams cannot overcome the work product privilege protecting this Memorandum. In addition, the margin notes are further protected from discovery to the extent they also record privileged attorney-client communications.

For these reasons, Adams' Motion to Compel must be denied.

Respectfully submitted,

READING BROADCASTING INC.

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Dated: July 13, 2000

## CERTIFICATE OF SERVICE

I, hereby certify that I caused a copy of the foregoing, Reading Broadcasting, Inc.'s Memorandum of Points and Authorities on the Issue of Privilege and Opposition to Adams' Motion to Compel," to be served, this 13th day of July 2000, as follows:

By Hand Delivery to:

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Administrative Law Judge
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